



SCOTT HARSHBARGER  
ATTORNEY GENERAL

(617) 727-2200

*The Commonwealth of Massachusetts*  
*Office of the Attorney General*  
*One Ashburton Place*  
*Boston, MA 02108-1698*

*[Handwritten signature]*  
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Cynthia L. Johnson  
Director, Cash Management Policy and Planning Division  
Financial Management Service  
U.S. Department of the Treasury  
401 14th Street, S.W., Rm. 420  
Washington, D.C. 20227

Dear Ms. Johnson:

We submit these comments on behalf of Massachusetts Attorney General Scott Harshbarger regarding the regulations that the U.S. Treasury Department has proposed to implement the mandatory electronic funds transfer law ("EFT-99"), codified at 31 U.S.C. § 3332. In issuing the proposed regulations (20 C.F.R. Part 208), Treasury has developed a proposal that will go far in cushioning the potentially negative impact of EFT-99 on vulnerable populations, such as elderly and disabled recipients of federal benefits. While our Office applauds the Department for such foresight, we believe that Treasury can and should do more to ensure that these vulnerable populations are not adversely impacted.

We recognize that direct deposit is an option that is more convenient and safer than paper checks for those recipients who already have bank accounts, and that it saves the federal government a substantial amount per payment. However, for many recipients who do not have bank accounts, especially the disabled and elderly, and in particular, frail or cognitively impaired elders, direct deposit could present a challenging obstacle and severe hardship.

One of the highest priorities for the Attorney General of Massachusetts has been the protection of the rights and interests of the elderly and disabled. To the extent that they lessen the potentially negative effects of EFT-99 on these populations, we support the proposed regulations. However, we believe that the regulations can do more to protect the elderly and disabled, and recommend a number of changes to that effect:

- 1. All Unbanked Social Security and SSI Recipients Should Be Automatically Exempted from EFT-99, then Given the Choice to Positively "Opt-in"; Direct Deposit Should Not be Imposed by Default.**

Treasury's establishment of broad categories of exemptions for financial, physical and geographic barriers is certainly a move in the right direction to avert serious hardships to

unbanked recipients. However, we believe that the regulations need to go further if Treasury is truly serious about preventing harm. In order to ensure that no elderly or disabled person suffers from EFT-99, the regulations need to include a blanket exemption for all unbanked recipients of Social Security and Supplemental Security Income. Elderly and disabled unbanked recipients should not be forced to take proactive actions to “opt-out” from EFT-99. Direct deposit should be a positive option for them, not a default.

According to Treasury’s own estimates, there are approximately 10 million recipients of federal payments who are “unbanked.” Of these, 4.5 million receive Social Security retirement and disability benefits, and 3.2 million receive SSI benefits. As Treasury already knows, these unbanked recipients do not have bank accounts for many compelling reasons, which the proposed exemptions recognize: inability to afford bank fees; lack of conveniently located bank branches; or physical inaccessibility of financial institutions. Creating a blanket exemption is important to prevent these recipients from unwittingly getting “defaulted” into direct deposit and forced to undergo unnecessary hardship.

The currently proposed “opt-out” waiver system creates a substantial likelihood of unnecessary and unwarranted “defaults.” Informing the 10 million unbanked recipients of federal benefits will be a tremendous task. With an “opt-out” system, there is the potential that some recipients will not realize that they have the option of a waiver. Even with the best notice, many elderly and disabled persons may have difficulty understanding their situation, especially if they have cognitive impairments or mental difficulties. Given the millions of unbanked Social Security and SSI recipients, even if a small percentage who qualify for hardship waivers fail to learn about them or lack the ability to ask for them, that small percentage would translate into thousands of elderly and disabled persons unjustly defaulted into direct deposit. Imagine the terrible hardship that will result for an 85 year old woman who suddenly finds herself forced to use a bank account that she can neither afford nor conveniently access.

An opt-out system also creates the risk of unwarranted defaults because of the huge administrative burden presented by the need to process possibly millions of requests for waivers. Inevitably, given the sheer magnitude of the undertaking, some recipients will encounter unwarranted difficulties or denials. In fact, we understand that because of the enormous workload resulting from EFT-99, the Social Security Administration may be asking for an administrative waiver for current recipients receiving checks in order to prevent its local offices and phone system from being overwhelmed. If a blanket exemption is not granted, such an administrative waiver is absolutely necessary to prevent bureaucratic chaos.

It is also important for Treasury to understand that negative opt-out waivers are an inferior mechanism for consumer choice under well-settled principles of consumer protection law. In Massachusetts, the Attorney General’s Office and the state legislature have generally disfavored negative opt-out consumer waivers, because they place the consumer at a distinct disadvantage, while placing the seller or service provider at an unfair advantage.

2. **In the Alternative, If Treasury Refuses to Grant a Blanket Exemption for Elderly and Disabled Unbanked Recipients, There Should Be Opt-out Categories for Recipients Who Have a Mental Disability, Limited English Proficiency, or Limited Literacy Skills.**

We believe that a blanket exemption is necessary so that no unbanked elderly or disabled recipient will experience hardship resulting from the federal government's attempt to save money. However, at a minimum, we would urge Treasury to broaden the hardships exemptions currently proposed. While we are pleased that Treasury has proposed exemptions for physical disabilities, geographic barriers, and financial hardship, these exemptions do not go far enough.

We would urge Treasury to provide exemptions for several other vulnerable populations, *i.e.*, persons who have cognitive impairments or mental disabilities, speak little or no English, or have limited literacy skills. Because of their special needs, mandatory direct deposit will create unique hardships for each population. As Treasury itself has admitted, 62 Fed. Reg. 48,718 (September 16, 1997), the legislative history of the Act refers to each of these three categories as the types of barriers which constitute a "hardship."

With respect to recipients with mental disabilities, Treasury's reasons for not proposing a waiver rely upon wholly erroneous and misguided assumptions. Contrary to Treasury's belief, not all persons with mental disabilities are incapable of managing their payments. Many persons with mild cognitive difficulties can live independently and handle their benefits in the form of checks. However, these individuals may not be capable of handling the more difficult world of electronic banking. For instance, these individuals may be able to cash a check, but might have difficulty making an ATM withdrawal or remembering a PIN number, tasks which confound even the most highly educated. The Massachusetts Attorney General's Office, which has had significant experience in areas of financial exploitation of elder populations, has handled countless cases where mildly impaired elders handle their own finances. Such individuals are not under any guardianship or conservatorship. It is sheer myth to assume that slightly impaired elders do not handle their own affairs; they do so everyday.

As for unbanked recipients with limited English proficiency or reading skills, such barriers may be partially responsible for the fact that they do not have bank accounts. Forcing accounts upon them would create unnecessary obstacles. Again, Treasury oversimplifies the situation when it states that "[e]ducational and language barriers can interfere with the comfortable and successful use of any method of payment, including checks and EFT." 62 Fed. Reg. 48,719. A check-based system is much easier to negotiate for these individuals than electronic banking. For example, a non-English speaking recipient may be able to cash a check at an ethnic grocery store or small business, but there may not be a bank or bank employees who speak her language. A recipient with limited education might read and write enough to sign his name to a check, but could not comprehend the more difficult language of

ATM instructions.

**3. Treasury Must Conduct an Extensive Notice, Public Education and Outreach Campaign.**

We would urge that an extensive, well-coordinated, and well-funded public education and outreach campaign be conducted to inform recipients of EFT-99. This campaign must educate recipients both about the features of direct deposit **and** -- if Treasury insists on an opt-out system -- the availability of hardship waivers. In addition, any media campaign should be carried out in consultation with appropriate agencies in every state who are most familiar with the demographics and special needs of their elderly and disabled populations.

This campaign should be conducted in multiple forms of media, including television, radio and print advertisements. Most important, over the next year, recipients should be notified of EFT-99 by means of check inserts sent on a regular basis. As documented by the study prepared by Booz-Allen & Hamilton Shugoll on behalf of Treasury, check inserts are the most effective means to notify benefits recipients.

Furthermore, Treasury should make special efforts to notify and educate recipients who have limited literacy skills or English proficiency. All check inserts, including notices of the availability of waivers, should be printed in several languages (not just English and Spanish) and educational materials should be made available in different languages at Social Security offices and U.S. Post Offices. Again, this is an area where Treasury must include state agencies in its planning process in order to insure that elderly and disabled linguistic minorities are appropriately reached and educated.

Personnel at local Social Security and other government offices should be trained to give detailed information and assist recipients with direct deposit questions and forms. If Treasury refuses to grant a blanket exemption for unbanked recipients, employees should be clearly instructed to inform recipients about their right to a hardship waiver, and should be cautioned not to discourage recipients from seeking waivers, or to demand evidence, given that the waivers are self-certifying.

**4. Electronic Transfer Accounts (ETAs) Should Have Minimal Fees and Provide All the Features of a Basic Bank Account.**

Currently, the proposed regulations do not address the features and fees that will be associated with the ETAs, leaving them to further rulemaking. We urge Treasury to mandate fees that make ETAs affordable to the unbanked. Many unbanked Social Security and SSI recipients have limited means and live on a fixed budget. If Treasury seriously desires to bring these individuals into the financial mainstream, it must ensure that they can afford to do so.

The elderly and disabled poor simply cannot afford fees such as those charged by Treasury's pilot projects. These fees, which included a \$2 to \$3 monthly charge and \$1 per ATM withdrawal, had the potential to add up to hundreds of dollars per year. In particular, there is a widespread movement by major banks across the country to impose surcharges on top of regular ATM fees. This advent of surcharges means that a low and fixed income elder could spend up to \$3 or \$4 for a withdrawal of \$20. This would be an unfair and unjust result. We believe that ETAs should not charge a monthly fee, and should provide at least 10 free withdrawals per month. Furthermore, the fee structure should be mandated by regulation to protect recipients against unrestrained fee increases.

In addition, the ETAs established by Treasury should include all of the privileges of a basic, bare minimum checking account, including check writing, ability to make deposits, and monthly statements. In particular, recipients who are assigned ETAs should absolutely not be forced to rely exclusively on ATMs to access their money, *i.e.*, they should have the choice of withdrawing their money from a teller or an ATM for the same fees and with the same number of free withdrawals. We cannot overly emphasize the absolute unfairness to elders and the disabled of any system where the federal government requires ATM use for these citizens to access their own money. This would be a patently absurd and unjust result for a very vulnerable population.

Finally, if the fee structure and services proposed in this comment require that ETAs be subsidized, the federal government should do so. After all, the federal government expects to save approximately \$0.40 per check, or \$500 million over the next five years, from EFT-99. Some of those savings should be used to help the most vulnerable citizens in our society.

## **5. The Regulations Should Forbid Financial Institutions from Relying on Fringe Bankers to Handle Federal EFT Benefits Payments.**

Treasury has made a serious omission in its regulations by failing to prohibit alternative financial services providers, *i.e.*, fringe bankers, from becoming conduits of federal EFT payments. While limiting the **deposit** of federal EFT payments to financial institutions, Treasury has stated that it will permit fringe bankers to **deliver** the payments to recipients by allowing them to partner with financial institutions. 62 Fed. Reg. 48,723. Thus, Treasury is permitting, and even encouraging the use of fringe bankers to deliver federal benefits payments, stating "non-financial institutions have performed such functions in the past and are developing new products and services" to respond to EFT-99.

Such reasoning fails to consider the needs and best interests of unbanked recipients, especially poor and urban recipients. First, fringe bankers perform their "services" at extremely high, often unconscionable, prices. In most states, they are subject to little or no regulation, and they are not covered by the protections of Regulation E. Some fringe bankers have engaged in grossly abusive and usurious practices. Yet Treasury is encouraging their use to deliver federal EFT payments. Second, as the Booz-Allen study documented, only 8% of

unbanked recipients use fringe bankers such as check cashers. Therefore, fringe bankers do not play a significant current role as a conduit of federal payments for the unbanked.

Treasury's rationale for not excluding fringe bankers from EFT-99 is that it "would place Treasury in the position of determining the reasonableness of prices charged by thousands of financial institutions, for a wide variety of account services, to individuals who have account relationships at institutions they have chosen voluntarily." However, we are not asking Treasury to regulate the fees charged by financial institutions; we are asking Treasury to prohibit financial institutions from partnering with fringe bankers to deliver federal EFT payments to recipients.

Financial institutions have a significant incentive to partner with fringe bankers to deliver payments to federal benefits recipients. Many mainstream financial institutions have failed, often deliberately, to establish a presence in low income and urban neighborhoods, especially minority communities. It would be easier and more profitable for financial institutions to partner with a fringe banker than to create the infrastructure necessary to serve bank-deprived communities. With Treasury embarking on a massive campaign to encourage direct deposit, unbanked recipients who have generally avoided fringe bankers may now be encouraged to establish accounts with them, because they want to open an account, but there is no nearby bank branch. If Treasury continues to permit and encourage financial institutions to partner with fringe bankers, the unfortunate result may be that the unbanked become further isolated from the banking mainstream.

We would like to emphasize that in Massachusetts, for the past 7 years, there has been a massive effort by our Office, the Banking Commissioner, and community banks to encourage mainstream banks to directly service communities that they historically shunned. We have encouraged these efforts, as part of the banks' Community Reinvestment Act obligations, in the wake of massive financial scandals by fly-by-night lenders who exploited these communities in the absence of the presence of alternatives by mainstream banks. To encourage the invasion of fringe bankers into such neighborhoods is a significant step backwards and will undermine CRA efforts.

**6. There Must be Greater Protections to Ensure that Social Security and SSI Payments are Safeguarded from Attachment or Garnishment.**

One reason that many recipients do not choose direct deposit is the fear that payments will be attached or garnished. This fear especially affects the elderly or disabled, who may face large medical bills. The proposed regulations can easily solve this issue, and encourage more recipients to use direct deposit, by including a presumption against the attachment or garnishment of any account into which federal payments are electronically transferred.

Protections against garnishment and attachment are critical for benefits recipients, who often have no other source of income and live on a month-to-month basis. We recognize that

various federal laws protect Social Security, SSI and Veterans benefits from attachment and the claims of judgment creditors. However, banks routinely fail to abide by these restrictions. The only remedy that recipients have if their funds are wrongfully attached is to file a lawsuit against the financial institution. This is simply inadequate to protect the interests of elderly and disabled recipients who desperately need funds to pay for food and basic living expenses.

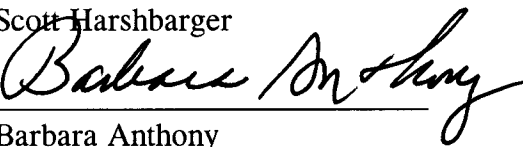
The appropriate solution is a regulation that presumptively forbids attachment of ETAs and voluntary accounts receiving federal EFT payments. The presumption against attachment can be overcome if the creditor is able to establish that the amount it seeks to attach did not originate from Social Security, SSI or Veterans benefits. Such a system would protect elderly and disabled recipients, while allowing a creditor to attach amounts to which it is legally entitled.

## 7. Conclusion

Direct deposit is a wonderful tool. It has the potential to make life easier for many senior citizens and disabled persons. It eliminates trips to the banks and reduces the potential of lost or stolen checks, while saving money for the federal government. However, like any tool, direct deposit also has the potential to cause great harm. The recommendations in this comment are intended to reduce that harm while preserving the benefits of an innovative program. We hope they are taken in that spirit.

If you have any questions or if our office can be of further assistance, please contact Assistant Attorneys General Chi Chi Wu at 617-727-2200, ext. 2571, or John C. Christin, Jr. at 617-727-2200, ext. 2912.

Respectfully submitted,  
Scott Harshbarger

By:   
Barbara Anthony  
Chief, Public Protection Bureau

Chi Chi Wu  
John C. Christin, Jr.  
Assistant Attorneys General  
Public Protection Bureau

cc: Evelyn Morton, Senior Program Specialist  
Public Policy Institute  
American Association of Retired Persons  
601 E Street, NW  
Washington, DC 20049

Margot Saunders, Managing Attorney  
National Consumer Law Center  
1629 K Street, N.W.  
Washington, DC 20006

The Honorable John F. Tierney  
U.S. House of Representatives  
120 Cannon House Office Building  
Washington, D.C. 20515

The Honorable John F. Kerry  
U.S. Senate  
421 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable William D. Delahunt  
U.S. House of Representatives  
1517 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Barney Frank  
U.S. House of Representatives  
2210 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Joseph P. Kennedy II  
U.S. House of Representatives  
2242 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Edward J. Markey  
U.S. House of Representatives  
2133 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable James P. McGovern  
U.S. House of Representatives  
512 Cannon House Office Building  
Washington, D.C. 20515



The Honorable Martin T. Meehan  
U.S. House of Representatives  
2434 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John Joseph Moakley  
U.S. House of Representatives  
235 Cannon House Office Building  
Washington, D.C. 20515

The Honorable Richard E. Neal  
U.S. House of Representatives  
2236 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable John W. Olver  
U.S. House of Representatives  
1027 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Edward M. Kennedy  
U.S. Senate  
315 Russell Senate Office Building  
Washington, D.C. 20510